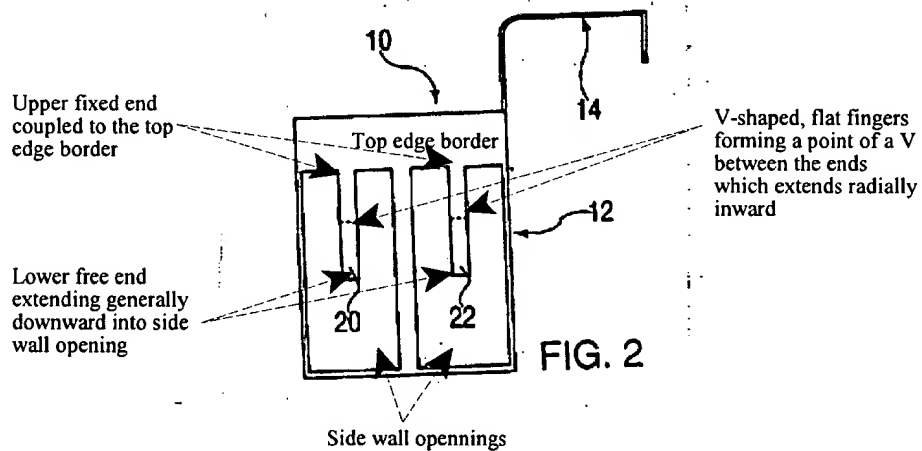


REMARKS

Reconsideration and withdrawal of the rejection with respect to all of the claims now in the application (i.e., Claims 18 and 20-22) is respectfully requested in view of the foregoing amendments and the following remarks.

By this Amendment, the claims have been amended to highlight the novel structure of the present invention and the distinctions thereof over the cited references. In particular, the claims were amended to clarify the structure of the resilient fingers, which is illustrated in Fig. 2, reproduced below:



In particular, in Claims 18 and 21, the structure of the fingers has been amended to clarify that they are V-shaped and flat and each has an upper fixed end which is coupled

to the top edge border of the rectangular basket / rectangular tray and a lower free end extending generally downward into one of said side wall openings (see Fig. 2 above). The claims have also been amended to clarify that the fingers form a biasing structure for releasably supporting a beverage container when inserted into the rectangular basket (See, specification pg. 8, paragraph 1). To do so, the fingers define a point of a V between said ends thereof and have a V-shaped profile when viewed in a vertical plane with the point of the V extending radially inwardly generally towards the center of the rectangular opening. (See, Fig. 1). The fingers cooperate to resiliently and releasably grasp both round and square beverage containers solely at the point of the V-shaped fingers.

Concerning the §112 rejection, by this amendment Applicant has deleted from Claims 18 and 21, the language "said V-shaped fingers each defining an included obtuse angle therebetween." Therefore, it is believed that this amendment renders the §112 rejection moot.

Turning to the §103 rejection of Claims 18 and 20 as being unpatentable over Hartmann et al. in view of Jackson and further in view of Bieck et al. and of Claims 21 and 22 in combination with Miller and/or Pratt, it is respectfully submitted that the cited references fail to disclose or suggest the presently claimed beverage container holder which includes V-shaped, flat resilient fingers, each of which has an upper fixed end and a lower free end and which define a point of a V between said ends thereof which extends radially inwardly generally towards the center of the respective rectangular opening to form a biasing structure for releasably supporting a beverage container inserted into said basket

by cooperating to resiliently and releasably grasp both round and square beverage containers solely at the point of the V-shaped fingers.

The present application is designed to hold both round or square beverage containers and this ability to hold different shaped and sized containers is due to the flat, V-shaped fingers which form a biasing structure to releasably support a beverage container inserted into the rectangular basket and cooperate to resiliently and releasably grasp both round and square beverage containers solely at the point of the "V". None of the cited patents disclose or suggest the V-shaped fingers claimed in the present invention which resiliently retract to accommodate the variable width and the contour of a round or square bottle or container to secure it in the holder.

Particularly, the cited references fail to disclose or suggest some reason why the structure of the present invention would be obvious in light of their teachings.

While the Court in KSR International Co. v. Teleflex Inc., 127 S. Ct. 1727, 82 U.S.P.Q.2d 1385 (2007) rejected a rigid application of the teaching, suggestion, or motivation ("TSM") test in an obviousness inquiry, the Court acknowledged the importance of identifying "a **reason** that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does" in an obviousness determination. KSR, 127 S. Ct. at 1731. Moreover, the Court indicated that there is "no necessary inconsistency between the idea underlying the TSM test and the Graham analysis." Id. As long as the test is not applied as a "rigid and mandatory" formula, that test can provide "helpful insight" to an obviousness inquiry. Id.

Takeda Chemical Industries Ltd. v. Alphapharm Pty. Ltd., 83 USPQ.2d 1169, 1174 (Fed. Cir. 2007) (emphasis added).

Even after KSR, it remains necessary to identify some reason that would have led one skilled in the art to modify the prior art in a particular manner to establish prima facie obviousness of a new claimed invention. Id.

In particular U.S. Patent No. D228,335 to Jackson, fails to disclose or suggest any fingers in connection with the beverage holder. Furthermore, U.S. Patent No. 5,938,160 to Hartmann fails to disclose or suggest V-shaped fingers as claimed in the present invention. While Hartmann discloses elongated pieces of plastic 16 extending from the cage to support a cup, as shown in Figs. 4, 5 and 7, they are not V-shaped, flat fingers and do not have a point of a V between said ends thereof or a V-shaped profile when viewed in a vertical plane.

Furthermore, Hartmann does not disclose the basket and opening being rectangular. It is clear from the description and illustrations in Hartmann that the device is intended to be used solely for round cups. In contrast thereto, the present invention claims use for both round and square beverage containers. There is no disclosure in Hartmann or any suggestion of the desirability of changing the configuration of the holder from a square to round or round to square configuration. Therefore, it is improper to combine this reference with the other cited references, unless there is some reason that can be found in the teachings thereof of the desirability of making such combination or of

V-shaped fingers as claimed in the present invention. This is clearly lacking here, causing the asserted combination to fail to render the present invention obvious over the combined prior art references.

Additionally, U.S. Patent No. 5,839,711 to Bieck et al. fails to disclose or suggest V-shaped, flat fingers which have an upper fixed end and a lower free end extending into a side wall opening, or fingers which define a point of a V between the ends thereof which cooperate to resiliently and releasably grasp both round and square beverage containers solely at the point of said V-shaped fingers, as claimed in the present invention.

In particular, as seen in Fig. 2 of Bieck, while it discloses holding jaws 20, they are not flat and are not shaped to define a point of a "V", as claimed in the present invention. Each of the solid holding jaws of Bieck has an inclined surface 28 and a flat supporting surface 30. The planar or flat supporting surface 30 is located at secant planes of the container receptacle 12 and are provided for abutting against a circumference of an inserted beverage container (col. 2, lines 46-58). Therefore, the holding jaws of Bieck are not shaped to define a point of a "V", since they have a flat supporting surface 30 which extends towards the inside of the container, and not a point, as claimed. The beverage container inserted in the holder in Bieck is secured by the flat supporting surface 30, and not solely at the point of the V-shaped fingers, as required by the claims as now amended. Additionally, as seen in Fig. 1, Bieck has locking jaws which are engaged by a ring on the outside of the holder and requires a complex arrangement including a holding jaw 20, spring ring 22, pegs 24, and guides 26.

The present invention eliminates the complex structure of Bieck and instead is a simpler, less expensive and easier to manufacture than the beverage holder disclosed in Bieck. As seen in Figs. 1 and 2 of the present invention, the beverage holder contains at least four flat resilient fingers being V-shaped to define a point of a "V" between the ends thereof and having a V-shaped profile when viewed in a vertical plane with the point of the "V" extending radially inwardly generally towards the center of the rectangular opening, which is not disclosed or suggested in Bieck. In Applicant's invention, the point of the "V" extends generally radially inwardly towards the center of the rectangular opening and the four fingers that define these points cooperate to resiliently and releasably grasp both round and square beverage containers solely at the point of said V-shaped fingers which is neither disclosed or suggested in Bieck or in combination with Jackson and Hartmann.

Moreover, in regard to the rejection of Claims 21 and 22, the additional cited references fail to correct the crucial deficiency noted above since Miller also fails to disclose V-shaped resilient fingers. Miller is a container holder for one or two round containers and discloses four arcuate-shaped resilient discs 35. However, these are not in the shape of a "V" but rather as seen in Fig. 1 are of a round shape projecting into the inside of the cup holder.

Furthermore, Claim 21 has been amended to set forth that the supporting member is beneath said pair of spaced apart rectangular openings to distinguish it from the reference to Miller which has two separate supporting members. In Miller, the beverage holders are not in a side by side relationship as depicted in Fig. 4 of the present invention.

Therefore, the beverage holder requires two separate container support members 38 and 48 (see Fig. 2). In contrast, the present invention places the cup holders side by side and provides for a supporting member 108 which extends beneath both of the openings to receive the beverages. Therefore, the present invention eliminates an extra piece that is required in the Miller patent which makes the construction simpler, less expensive and easier to manufacture.

Additionally, Pratt is a round cup holder and fails to correct the crucial deficiencies noted above as it does not have V-shaped fingers to engage the beverage container. Therefore, it is respectfully submitted that the cited references alone or in combination fail to disclose or suggest the structure of the claims as now amended.

It is only through improper hindsight reasoning in light of the Applicant's disclosure that these references can be combined in the manner suggested in the Office Action in an attempt to reconstruct the claimed invention which is, of course, improper. As noted above, in order for the teachings of these patent references to be properly combined, there must be some reason in the patents themselves which would suggest the desirability of such a combination. The mere fact that the prior art may be modified to produce the claimed invention does not make the modification obvious unless the prior art suggested the desirability of the modifications. In re Fritch, 23 USPQ.2d 1780 (Fed. Cir. 1992). Such suggestion is clearly lacking here, necessarily causing the asserted combination to fail in rendering the claimed invention obvious.

Finally, while it is believed that no fee is required, any fee deficiency or overpayment may be charged or credited to Deposit Account No. 50-3990.

In view of the foregoing, it is respectfully submitted that the present invention as now set forth in Claims 18 and 20-22 is patentable over the cited art and, therefore, allowance of the aforesaid claims at an early date is earnestly solicited.

Respectfully submitted,

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